

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

JAMES A. KAY, JR.

Licensee of One Hundred Fifty Two
Part 90 Stations in the
Los Angeles, California Area

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)
) WT DOCKET NO. 94-147
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)
)

To: The Commission

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**ENFORCEMENT BUREAU'S OPPOSITION
TO
PETITION FOR RECONSIDERATION**

1. On February 25, 2002, James A. Kay, Jr. ("Kay") filed a Petition for Reconsideration ("*Petition*") of the Commission's *Decision*, FCC 01-341 (released January 25, 2002) in the above-captioned matter. The Enforcement Bureau hereby opposes the *Petition*.¹

**I. THE COMMISSION PROPERLY RESOLVED THE CONFLICT BETWEEN THE
TWO UNDERLYING INITIAL DECISIONS**

2. Kay's initial claim that the Commission improperly resolved a conflict between Judge Chachkin's Initial Decision in the instant hearing² and Judge Frysiak's Initial Decision in

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¹ This pleading is timely filed, pursuant to Section 1.4 of the Commission's rules, 47 C.F.R. § 1.4. Although the Petition for Reconsideration to which the instant Opposition is being interposed states that it was transmitted to Bureau counsel by mail and facsimile, in fact it was mailed on February 25, 2002, and transmitted via e-mail (without attachments) on February 26, 2002.

² *Initial Decision of Administrative Law Judge Joseph Chachkin*, FCC 99D-04 (released September 10, 1999) ("*Chachkin I.D.*").

the Marc Sobel ("Sobel") hearing³ lacks merit. Kay argues that Judge Chachkin's Initial Decision should be recognized as more authoritative because, among other things, the Kay hearing lasted longer than the Sobel hearing and Judge Chachkin would not have lightly disputed an earlier decision of a fellow judge.⁴ None of Kay's claims warrants reconsideration of the Commission's *Decision*.

3. The Commission expressly acknowledged the conflict between the two Initial Decisions.⁵ In so doing, the Commission properly decided not to give greater deference to either one. Instead, it critically examined the evidence and resolved the conflict based on the records in the two proceedings. The Kay hearing appropriately lasted longer than the Sobel hearing given the number of issues to be decided. However, it was in the Sobel hearing, not the instant one, that Kay was found to have engaged in the unauthorized transfer of control of Sobel's stations, in violation of Section 310(d) of the Communications Act of 1934, as amended. Judge Chachkin's findings on this matter were limited to determining the effect of the adverse resolution of the transfer issue on Kay's qualifications to be and remain a Commission licensee.⁶

³ *Initial Decision of Administrative Law Judge John M. Frysiak*, 12 FCC Rcd 22879 (1997).

⁴ *Kay Petition*, pp. 1-4.

⁵ *Decision*, ¶ 86.

⁶ *See Memorandum Opinion and Order*, FCC 98M-26 (Judge Sippel, released March 5, 1998); *see also Chachkin I.D.*, pp. 3, 44 and 66, n.48.

4. Moreover, to the extent that Judge Chachkin made findings contrary to those of Judge Frysiak, the Commission recognized that Judge Chachkin's findings contained profound errors, which cast serious doubt on his conclusions. For example, after an exhaustive analysis, the Commission flatly rejected findings by Judge Chachkin that counsel for the Wireless Telecommunications Bureau had engaged in prosecutorial misconduct by somehow concocting an "elaborate scheme" to conceal information from Judge Frysiak.⁷ In addition, the Commission found no basis for affording deference to Judge Chachkin's findings on the credibility of the testimony provided by Messrs. Kay and Sobel, given the Commission's "own independent assessment of the nature of the representations made and the circumstances that were involved."⁸ While credibility and demeanor findings ordinarily are afforded deference, they may be rejected, *as was the case here*, where they are patently in conflict with the record evidence.⁹

II. LICENSEES ARE REQUIRED TO RESPOND TO SECTION 308(b) REQUESTS

5. Kay's suggestion that licensees may elect whether to comply with written Commission requests for information relating to the operations of their stations also lacks merit. The plain language of Section 308(b) of the Act, upon which the Commission's pre-hearing

⁷ *Decision*, ¶ 89.

⁸ *Decision*, ¶ 86.

⁹ In *Milton Broadcasting Company*, 34 FCC 2d 1036, 1045 (1972), the Commission stated, "While we are reluctant to overturn the findings of a hearing examiner, particularly where, as here, many of his findings are based on his assessment of the credibility of the witnesses, we would be derelict in our statutory duty to act in the public interest if we were to accept findings

requests for information in this case were predicated, states that the Commission may *require* production of materials relevant to the exercise of its jurisdiction.¹⁰ Indeed, the Commission could not reasonably carry out its statutory obligations if those whom it licenses were free to “thumb their noses” at legitimate requests for information relating to the operations of their stations.

6. There is no basis in law for Kay’s claim that the Commission’s ability to issue subpoenas somehow limits the reach of Section 308(b). In this regard, Kay states, without any support whatsoever, that “if a subpoena issued by the Commission in a formal proceeding requires judicial enforcement, an informal request for information from a low-level Commission employee can not possibly impose a mandatory obligation on a licensee.”¹¹ While the Commission’s subpoena power extends the Commission’s ability to obtain information from the public at large, it does not limit the Commission’s authority to require information from its licensees.

7. Further, Kay’s reliance on *PTL of Heritage Village Church and Missionary Fellowship, Inc.*, 71 FCC 2d 324 (1979) (“*PTL*”),¹² is misplaced. Kay fails to note that *PTL* involved a telegram requesting the licensee to make persons available for interviews and records

which are patently in conflict with what we find to be the facts as established by the record.”

¹⁰ 47 U.S.C. § 308(b).

¹¹ *Kay Petition*, p. 6-7.

¹² *Kay Petition*, p. 5.

available for inspection by FCC personnel.¹³ The specific language in *PTL* upon which Kay relies related to a discussion of whether such inspection by FCC personnel violated the licensee's rights protected by the Fourth Amendment to the U.S. Constitution. The Commission in *PTL* rejected the licensee's Fourth Amendment claim as well as all of its other arguments. The Commission stated in *PTL* that in this situation a licensee could insist on formal procedures and the Commission will issue a subpoena. Kay never requested a subpoena. He simply refused to produce the requested information by the applicable deadlines. Further, *PTL* does not stand for the proposition, as Kay suggests, that a licensee has the discretion to refuse a written request for information made pursuant to § 308(b). To the contrary, the Commission has made it abundantly clear, both before and after the *PTL* decision, that licensees have a duty to comply with its written requests for information. *See, e.g. Carol Music, Inc.* 37 FCC 379, 383-84 (1964) (refusal to provide information requested in a § 308(b) request may, standing alone, be sufficient grounds to warrant revocation of licenses). Moreover, Section 1.17 of the Commission's rules, which implements Section 308(b) of the Act, explicitly requires licensees to provide information responsive to written requests.¹⁴

¹³ *PTL*, 71 FCC 2d at 325, ¶ 4.

¹⁴ 47 C.F.R. § 1.17 (1994). *See Policy Regarding Character Qualifications in Broadcast Licensing, Amendment of Part 1, the Rules of Practice and Procedure, Relating to Written Responses to Commission Inquiries and Making of Misrepresentations to Commission by Applicants, Permittees, and Licensees, and the Reporting of Information Regarding Character Qualifications*, 5 FCC Rcd 3252 (1990) (The Commission noted that Section 1.17 relates to "written matter."). *See also, Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission*, GC Docket No. 02-37, FCC 02-54 (released February 22, 2002), at ¶ 4.

8. In its *Decision*, the Commission devoted no fewer than 38 paragraphs, spanning a total of 13 pages, to evaluating Kay's failure to properly respond to the staff's multiple Section 308(b) requests. Kay's remaining arguments involving his Section 308(b) compliance were all previously considered and rejected by the Commission. Thus, the Commission analyzed and rejected Kay's claim that the Section 308(b) requests were overbroad;¹⁵ Kay's assertion that assurances of confidentiality were inadequate given the staff's response to Kay's copyright disclaimer¹⁶ and the "Thompson Tree Incident;"¹⁷ and his claim that the Northridge Earthquake¹⁸ was a burden justifying his failure to produce the requested information.¹⁹

III. KAY ACTED WITH DECEPTIVE INTENT

9. Notwithstanding Kay's arguments to the contrary, the Commission appropriately found that Kay acted with deceptive intent. "[T]he fact of misrepresentation coupled with proof

¹⁵ *Decision*, p. 14.

¹⁶ *Decision*, p. 14.

¹⁷ The Commission reviewed Kay's account of the "Thompson Tree Incident" and determined it does not provide a basis for Kay's assertion that the staff sought to disclose confidential information. *James A. Kay, Jr.*, 13 FCC Rcd 16369, 16374 n.3 (1998).

¹⁸ *Decision*, p. 14.

¹⁹ The Bureau believes, based on the totality of the evidence, that Kay acted in a recalcitrant manner regarding his Section 308(b) obligations in order to conceal material information from the Commission evidencing misconduct; *to wit*, his undisclosed control of stations licensed to Sobel and the non-construction of various stations whose licenses would be subject to cancellation if such status were revealed. See *Chachkin I.D.*, ¶¶ 82 and 220.

that the party making it had knowledge of its falsity [is] enough to justify a conclusion that there was fraudulent intent." *Leflore Broadcasting Co. Inc. v. FCC*, 636 F.2d 454, 462 (D.C. Cir. 1980). Intent may be inferred when a party has a clear motive to deceive. *See, e.g., RKO General, Inc.*, 4 FCC Rcd 4679, 4684 (Rev. Bd. 1989). Intent may also be found when the surrounding circumstances clearly show the existence of an intent to deceive, even if there is no direct evidence of intent to deceive. *American International Development, Inc.*, 86 FCC 2d 808, 816 n.39 ("The Board is correct that the absence of direct evidence of motive is not significant where the record otherwise clearly establishes that deceptive conduct has occurred.")

10. In the instant case, Kay made a false report to the Commission. Kay did so motivated by a desire to avoid Commission scrutiny of his control of stations licensed to Sobel. The circumstances surrounding the deception indicate that Kay was not forthcoming about any of the stations he manages. Specifically, Kay falsely reported in his prehearing responses that he was not operating stations licensed to Sobel, thereby concealing the fact that Kay and Sobel had engaged in unauthorized transfers of control.²⁰ Kay later filed a motion (containing his attestation under oath) and an affidavit from Sobel asserting that Kay and Sobel were completely independent, and that Kay did not have any interest in any Sobel station.²¹ Kay's motion was motivated by his desire to have the Sobel licenses removed from the revocation hearing prior to Commission scrutiny regarding control of those stations. Finally, the Commission found that the

²⁰ *Decision*, ¶¶ 92, 99.

²¹ *Decision*, ¶ 92.

circumstances surrounding the deception indicated Kay was not forthcoming about the stations he was managing (stations licensed to Sobel, Carla Pfeiffer and Vincent Cordaro) and that there was a pattern of deception.²²

IV. TRANSFER OF CONTROL

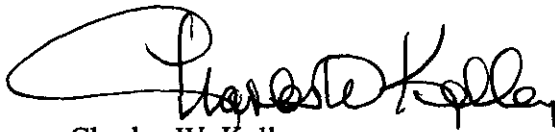
11. Kay asserts that he is collaterally estopped from arguing against the Commission's finding regarding the transfer of control between Kay and Sobel in this proceeding, but that the Commission should consider his arguments set forth in *Marc Sobel*, WT Dkt. 97-56. The Bureau submits that nothing Kay has presented in the *Sobel* proceeding warrants a change in the result in this proceeding.

²² *Decision*, ¶ 97.

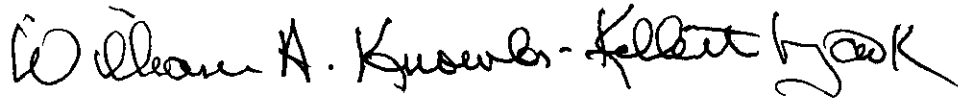
V. CONCLUSION

12. The Bureau submits that contrary to Kay's assertions, the Commission's decision in this matter was appropriate, fair, thorough, and balanced. Accordingly, Kay's Petition for Reconsideration should be denied.

Respectfully submitted,



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March 12, 2002

CERTIFICATE OF SERVICE

I, Karen Richardson, a legal technician in the Investigations and Hearings Division, Enforcement Bureau, certify that I have, on this 12th day of March 2002, sent by first class mail (unless otherwise indicated), copies of the foregoing "Enforcement Bureau's Opposition to Petition for Reconsideration" to:

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